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Truong Thi Hang v Public Prosecutor

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COURT OF APPEAL (PUTRAJAYA) — CRIMINAL APPEAL NO B-05(M)-344–09 OF 2016 (VNM)
ZAWAWI SALLEH, IDRUS HARUN AND ZABARIAH YUSOF JJCA
9 AUGUST 2017

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Criminal Law — Dangerous Drugs — Innocent carrier — Accused convicted with offence of trafficking in dangerous drugs and sentenced to death penalty — Whether drugs did not belong to accused — Whether accused innocent carrier

D

Criminal Procedure — Appeal — Appeal against conviction and sentence — Accused convicted with offence of trafficking in dangerous drugs and sentenced to death penalty — Whether prosecution failed to prove overt act on part of accused to constitute trafficking — Whether elements of trafficking proven — Whether accused innocent carrier — Dangerous Drugs Act 1952 ss 2 & 39B(1)(a) & (2)

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The accused was charged with the offence of trafficking in dangerous drugs under s 39B(1)(a) of the Dangerous Drugs Act 1952 ('the Act'). The learned High Court judge found that the prosecution failed to prove prima facie case against the accused and consequently, the accused was acquitted and discharged without her defence being called. On appeal, the decision was reversed by the Court of Appeal and the accused was ordered to enter defence. The case was remitted to the High Court for trial of the defence. In defence, the accused mentioned the existence of one Fang who was allegedly responsible for putting the drugs in her luggage bag and the accused submitted that she was an innocent carrier. The learned High Court judge found that the defence had failed to raise a reasonable doubt on the prosecution's case. Consequently, the accused was convicted of the offence of trafficking and sentenced to death penalty. Aggrieved by the decision, the accused filed the present appeal. The accused submitted that the prosecution failed to prove overt act on the part of the accused to constitute trafficking.

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Held, dismissing the appeal and affirming the conviction and sentence of the learned High Court judge:

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(1) The issue of whether 'trafficking' was proven was not a ground in the petition of appeal filed by the accused. Hence, it should not be raised by the accused. In addition, the accused was ordered to enter defence by the Court of Appeal and not by the trial court. As defence had been called on the charge of trafficking, it was to be presumed that all ingredients of

trafficking had been proven at the prima facie level. It was not for the present court to revisit on those issues anymore (see paras 24–26).

(2) The proposition that there must be in all cases an overt act in order to constitute trafficking was misplaced. From the facts, the manner the drugs were carried ie concealed in a secret compartment and the large quantities involved (1,490.7g), it could not be said that it was for personal consumption. Neither had it been suggested to be so by the accused, in fact the defence totally denied knowledge of the presence of the drugs in the luggage bag. These facts negatived the defence case that the accused was a passive carrier (see para 33).

(3) In the present case, the accused could not give any details of Fang. Further, there was no instruction from Fang as to how the impugned drugs were to be delivered. If that was the situation, in all likelihood the drugs did not belong to Fang. Hence, the court did not find that the learned trial judge was wrong when he made the finding that 'there was nothing in the evidence of the accused to raise any doubt that the drugs did not belong to the accused or that she had brought the drugs into Malaysia for the purpose of trafficking' (see para 41).

(4) The accused's story was highly improbable, and she could not exculpate herself by denying knowledge or that she was an innocent carrier. Based on the findings above, clearly the accused's act fell within the definition of s 2 of the Act, which included the act of carrying, concealing, transporting, exporting and keeping. Hence, the charge of trafficking had been proved beyond reasonable doubt against the accused. There was no appealable error on the part of the learned trial judge (see paras 45–46).

[Bahasa Malaysia summary

Tertuduh dituduh dengan kesalahan mengedar dadah berbahaya di bawah s 39B(1)(a) Akta Dadah Berbahaya 1952 ('Akta'). Hakim Mahkamah Tinggi yang bijaksana mendapati bahawa pihak pendakwaan gagal untuk membuktikan kes prima facie terhadap tertuduh dan akibatnya, tertuduh dibebaskan dan dilepaskan tanpa pembelaannya dipanggil. Atas rayuan, keputusan diakas oleh Mahkamah Rayuan dan tertuduh diperintahkan untuk memasukkan pembelaan. Kes diremit kembali ke Mahkamah Tinggi untuk perbicaraan pembelaan. Dalam membela, tertuduh menyebut kewujudan seorang yang bernama Fang yang didakwa bertanggungjawab meletakkan dadah tersebut di dalam bagasinya dan tertuduh berhujah bahawa dia adalah pembawa tidak bersalah. Hakim Mahkamah Tinggi yang bijaksana mendapati bahawa pembelaan telah gagal untuk membangkitkan keraguan munasabah ke atas kes pihak pendakwaan. Akibatnya, tertuduh disabitkan terhadap kesalahan mengedar dadah dan dijatuhkan hukuman mati. Tidak puas hati dengan keputusan tersebut, tertuduh memfailkan rayuan ini. Tertuduh berhujah bahawa pihak pendakwaan gagal untuk membuktikan perbuatan

terang-terangan oleh pihak tertuduh untuk membentuk pengedaran dadah. A

Diputuskan, menolak rayuan dan mengesahkan sabitan dan hukuman hakim Mahkamah Tinggi yang bijaksana:

(1) Isu sama ada 'trafficking' dibuktikan bukan alasan dalam petisyen rayuan yang difailkan oleh tertuduh. Maka, ia tidak patut dibangkitkan oleh tertuduh. Selanjutnya, tertuduh diperintahkan untuk memasukkan pembelaan oleh Mahkamah Rayuan dan bukan oleh mahkamah perbicaraan. Memandangkan pembelaan telah dipanggil atas tuduhan pengedaran dadah, ia adalah dinggap bahawa kesemua unsur pengedaran telah dibuktikan di peringkat prima facie. Ia adalah bukan untuk mahkamah ini menyemak semula ke atas isu-isu itu lagi (lihat perenggan 24–26). B C

(2) Pernyataan bahawa ia mesti terdapat di dalam kesemua kes perbuatan terang-terangan untuk membentuk pengedaran dadah adalah salah arah. Daripada fakta, cara dadah tersebut dibawa iaitu disembunyikan di dalam bahagian rahsia dan kuantiti yang besar terlibat (1,490.7g), ia tidak dapat dikatakan bahawa ia adalah untuk kegunaan peribadi. Ia juga tidak dicadangkan untuk kegunaan peribadi oleh tertuduh, sebenarnya pembelaan menafikan sepenuhnya pengetahuan mengenai kehadiran dadah tersebut di dalam bagasi. Fakta ini menolak kes pembelaan bahawa tertuduh adalah pembawa pasif (lihat perenggan 33). D E

(3) Dalam kes ini, tertuduh tidak dapat memberi apa-apa butir mengenai Fang. Selanjutnya, tidak terdapat arahan daripada Fang bagaimana dadah yang dipersoalkan tersebut akan dihantar. Jika ia adalah keadaannya, dalam semua kemungkinan dadah tersebut bukan milik Fang. Maka, mahkamah tidak mendapati bahawa hakim perbicaraan yang bijaksana adalah salah apabila beliau membuat dapatan bahawa 'there was nothing in the evidence of the accused to raise any doubt that the drugs did not belong to the accused or that she had brought the drugs into Malaysia for the purpose of trafficking' (lihat perenggan 41). F G

(4) Cerita tertuduh adalah amat sukar dipercayai, dan dia tidak dapat membebaskan dirinya dengan menafikan pengetahuan atau bahawa dia adalah pembawa tidak bersalah. Berdasarkan dapatan di atas, jelas tindakan tertuduh terangkum dalam definisi s 2 Akta, yang mana terlibat tindakan membawa, menyembunyikan, menghantar, mengekspot dan menyimpan. Maka, tuduhan pengedaran dadah telah dibuktikan melampaui keraguan munasabah terhadap tertuduh. Tidak terdapat kesilapan yang boleh dirayukan ke atas bahagian hakim perbicaraan yang bijaksana (lihat perenggan 45–46).] H I

Notes

For a case on innocent carrier, see 4(1) *Mallal's Digest* (5th Ed, 2015) para 260. For cases on appeal against conviction and sentence, see 5(1) *Mallal's Digest* (5th Ed, 2017 Reissue) paras 321–500.

Cases referred to

Ong Ah Chuan v PP; Koh Chai Cheng v PP [1981] 1 MLJ 64, PC (refd)
Pendakwa Raya lwn Sulaiman bin Saidin [2010] 3 MLJ 383, CA (refd)
PP v Abdul Manaf bin Muhamad Hassan [2006] 3 MLJ 193; [2006] 2 CLJ 129, FC (refd)
PP v Abdul Rahman bin Akif [2007] 5 MLJ 1; [2007] 4 CLJ 337, FC (refd)
PP v Herlina Purnama Sari [2016] 2 MLJ 724; [2017] 1 MLRA 499, CA (refd)

Legislation referred to

Dangerous Drugs Act 1952 ss 2, 39B(2)

Appeal from: Criminal Trial No 45A-130–06 of 2013 (High Court, Shah Alam)

Muhammad Rafique (Law Practice of Rafique) for the appellant.
Nadia Hanim Mohd Tajuddin (Deputy Public Prosecutor, Attorney General's Chambers) for the respondent.

Zabariah Yusof JCA:

INTRODUCTION

[1] The appellant ('the accused') was charged in the High Court as follows:

> Bahawa kamu pada 2 Disember 2012, jam lebih kurang 1 pagi, di Cawangan Pemeriksaan Penumpang 2 ('CPP 2'), di Terminal Pengangkutan Tambang Murah ('LCCT') Lapangan Terbang Antarabangsa Kuala Lumpur, di dalam daerah Sepang, di dalam negeri Selangor Darul Ehsan, telah mengedar dadah berbahaya iaitu methamphetamine seberat 1490.7 gram dan dengan itu kamu telah melakukan kesalahan di bawah s 39B(1)(a) Akta Dadah Berbahaya 1952 yang boleh dihukum di bawah s 39B(2) Akta yang sama.

[2] The trial of the accused proceeded in the High Court and at the end of the prosecution's case, the learned High Court judge found that the prosecution failed to prove a prima facie case against the accused. Accordingly, the learned High Court judge acquitted and discharged the accused without her defence being called.

[3] Dissatisfied with the decision, the prosecution appealed to the Court of Appeal where the decision of the High Court was reversed and the accused was ordered to enter defence on the charge preferred. The case was remitted to the High Court for trial of the defence case.

[4] In the defence case at the High Court, only the accused gave evidence. She gave evidence on oath and at the end of the trial of the defence case, the learned trial judge found that the defence had failed to raise a reasonable doubt on the case of the prosecution. His Lordship found the accused guilty of the offence of trafficking in dangerous drugs and sentenced the accused under s 39B(2) of the Dangerous Drugs Act 1952.

[5] Hence the appeal by the accused before us.

[6] After hearing submission from parties and perusing through the appeal records, we found that the appeal by the accused has no merits. The High Court judge did not err in his findings. We affirmed the decision of the High Court judge in convicting and sentencing the accused accordingly.

[7] Herein below are our grounds.

BACKGROUND

[8] In the defence, only the accused gave evidence on oath.

[9] In her evidence, the accused said that she was a housewife living in Vietnam and had never travelled abroad. Her husband carries on a business repairing Honda motorcycle. Occasionally, she helps her husband in his business.

[10] In Vietnam, in October 2012 she had the occasion to befriend an Indian national by the name of 'Fang'. She first met him at a coffee shop in Vietnam. She met him about five times, before he left back for India. In the course of those meetings and conversations, Fang invited her to travel to India and visit places of interest. Fang also intimated that he could show her some interesting places to visit in India.

[11] The accused took up on the offer of visiting India and bought a ticket for the said purpose. On 24 November 2012, she took a flight from Vietnam to Malaysia and then on 27 November 2012 she flew to Calcutta, India.

[12] In India, Fang took her shopping and bought her things. Due to the many things bought, the accused said that her existing bag could no longer hold her clothing, hence Fang purchased a large luggage bag ('exh P24') for her.

[13] When the time came for the accused to return to Vietnam on 1 December 2012, Fang had asked the accused to bring some threads to be delivered to a friend in Malaysia, which the accused did, as she was supposed to be in transit in Malaysia, before her onward flight to Vietnam. The accused was told by Fang that when she arrived in Malaysia, she was to go to a nearby hotel to the airport and the so called friend would come to fetch the thread from her.

[14] However, when the accused arrived at the airport in Malaysia, the accused was arrested by custom's officers with the luggage bag, P24, containing the dangerous drugs which is the subject of the charge against her.

Submission by the defence

[15] The defence raised one main issue in her submission ie that the prosecution had failed to prove that the accused 'traffic' in the dangerous drugs as charged.

[16] It was submitted by the defence that, the mere fact that the accused was apprehended and thereafter dangerous drugs were found in her bag, P24, is insufficient to constitute 'trafficking' and does not ipso facto make one a trafficker under the scheme of the Dangerous Drugs Act 1952 ('the DDA').

[17] It was in evidence by SP3, (a customs officer who was on duty at LCCT, KLIA at the material time) that the accused did not give any reaction when her bag, P24, was put in the scanner machine and when the suspicious image was detected by the scanner machine. Neither did the accused show any reaction during the scanning of the bag, P24, and when the search on the said bag was made.

[18] The defence asserted that 'trafficking' would only be proven beyond reasonable doubt if there existed an overt act or there was a mens rea element present. The defence submitted that the prosecution had failed to prove any overt act on the part of the accused or mens rea for trafficking against the accused.

[19] There is also no evidence adduced by the prosecution to show that the drugs recovered in the bag, P24, of the accused would be delivered/sold to a third party.

[20] Further, there was no evidence that the accused attempted to run when in fact she merely surrendered to the police when she was apprehended.

[21] The accused was merely to deliver the four packages of threads ('P53AD') which was in the bag, P24, to a third party.

[22] The defence also submitted that there was no evidence, whether direct, documentary or circumstantial that showed that the intention of the accused to come to Malaysia was to traffic drugs to a third party. Apart from that, there is evidence to show that the accused was in Malaysia 'in transit' before her onward flight to Ho Chi Minh City, Vietnam.

[23] There was also a misdirection on the part of the learned trial judge when His Lordship failed to make any finding that the purpose for which the appellant was in possession of the impugned substance found in the bag was to transfer possession of the same to someone else. Thus, the act of the accused in carrying and transporting the luggage bag which contained the impugned drugs was not sufficient to prove the offence of trafficking. The defence referred us the case of *Public Prosecutor v Abdul Manaf bin Muhamad Hassan* [2006] 3 MLJ 193; [2006] 2 CLJ 129, which held that the 'mere act of carrying was not sufficient to constitute the offence of trafficking'. This case also referred to that part of the judgment of Lord Diplock in the case of *Ong Ah Chuan v Public Prosecutor; Koh Chai Cheng v Public Prosecutor* [1981] 1 MLJ 64 where at p 68 he observed that:

> To 'traffic' in a controlled drug so as to constitute the offence of trafficking under s 3 involves something more than passive possession or self-administration of the drug: it involves doing or offering to do an overt act of one or other of the kinds specified in para (a) of the definition of 'traffic' or 'trafficking' in s 2 ...

OUR FINDINGS

Whether 'trafficking' was proven

[24] Essentially, the accused's submission hinges on the failure of the prosecution to prove an overt act on the part of the accused to constitute 'trafficking' of which the accused was charged for.

[25] Firstly, this issue raised by the defence is not a ground in the petition of appeal filed by the accused. Hence, it should not be raised by the accused.

[26] Secondly, it is to be noted that the accused was ordered to enter defence on the charge by the Court of Appeal, not by the trial court. The Court of Appeal unanimously on 11 March 2016, had determined that there was a prima facie case against the accused and that all the elements of the charge of

A trafficking had been proven at the end of the prosecution stage and that defence to be called on the said charge. As defence has been called on the charge of trafficking, it is to be presumed that all the ingredients of trafficking has been proven at the prima facie level. It is not for this court to revisit on those issues anymore, unless there is new evidence raised by the defence that is capable of raising reasonable doubt on the prosecution's case. This court in *Pendakwa Raya lwn Sulaiman bin Saidin* [2010] 3 MLJ 383 held that:

> [27] Sebelum merumuskan isu atau isu-isu yang berbangkit dalam rayuan ini, kami mendapati perlu untuk mengulangi bahawa tertuduh telah dipanggil untuk membela diri setelah mahkamah ini, dalam rayuan terdahulu, mengenepikan keputusan hakim bicara di akhir kes pendakwaan. Sehubungan dengan itu kami mendapati tiada keperluan bagi kami untuk menimbangkan semula isu-isu yang telah diputuskan oleh mahkamah ini terdahulu mengenai isu-isu yang telah dibangkitkan di akhir kes pendakwaan, kecuali jika terdapat keterangan-keterangan baru yang dibangkitkan oleh pembelaan yang boleh menimbulkan keraguan yang munasabah ke atas kes pendakwaan.

There are no new issues raised by the defence, hence the issue raised, as to whether there is proof of an overt act to constitute the offence of 'trafficking' is a non-starter.

[27] What is to be determined after defence is called, is whether the accused had raised a reasonable doubt on the case of the prosecution. The burden on the accused is light, ie to merely cast a reasonable doubt on the prosecution's case. The court need not be convinced of the defence story to be entitled to an acquittal at the end of the defence case (refer to *Public Prosecutor v Abdul Rahman bin Akif* [2007] 5 MLJ 1; [2007] 4 CLJ 337).

[28] Although, there is no necessity for us to delve into the proposition by the defence that the mere transporting and carrying the bag which contained the drugs, without an overt act is insufficient to constitute trafficking (for the reasons abovementioned), for the sake of completeness, we are minded to bring to the fore, the relevant findings in the Federal Court case of *Public Prosecutor v Herlina Purnama Sari* [2016] 2 MLJ 724; [2017] 1 MLRA 499 in relation to the same proposition.

[29] The facts in *Herlina Purnama Sari* are almost similar to the facts in our present appeal. It was held by the Federal Court at p 729 (MLJ); p 509 (MLRA) that:

> [36] ... We find that the trial judge had made two erroneous findings. Firstly, the issue that the respondent had successfully rebutted the presumption of knowledge ... does not arise in this case ... at the end of the prosecution's case, the trial judge had made affirmative findings that the respondent had custody and control as well as knowledge of the impugned drugs. And relying on the definition of 'trafficking' in

s 2 of the Act, he found that the acts of transporting and carrying of the impugned drugs as well as the manner the impugned drugs were concealed were acts which constituted trafficking. Section 37(d) was never invoked by the trial judge in deciding to call upon the respondent to enter on her defence. Thus, to say, that at the end of the defence case, the respondent had successfully rebutted the presumption under s 37(d) was a manifest error on the part of the trial judge.

[37] The second error was the trial judge's finding that to constitute trafficking the mens rea possession must be accompanied by some overt act by the respondent. It is unfortunate that the Court of Appeal had also committed a similar error in agreeing with the finding of the trial judge by holding that 'without any evidence that would show an overt act of one or other of the kind specified in the definition of trafficking in s 2 of Act 234 or specifically of conveying, transporting, carrying, moving or promoting from one place to another in the sense of doing so to promote the distribution of the drug to another', the respondent could not be a trafficker but merely had passive possession of the impugned drugs.

[38] With respect, the proposition that there must be in all cases an overt act in order to constitute trafficking is misconceived. It would be contrary to the definition of s 2 of the Act. In the present case, there is no dispute that the respondent did not try to do anything, when she was approached by PW4, to disassociate herself with the impugned drugs ...

[39] We are of the view that whether or not a person is a trafficker within the definition of s 2 of the act is dependent on the facts and circumstances of a given case ...

[30] The facts in the present appeal showed that the accused was apprehended when she was carrying the luggage bag, P24, which contained the impugned drugs. She was alone and not accompanied by anyone. It is not in dispute that the luggage bag was hers. At that point in time, she had custody and control of the luggage bag, P24. The drugs were cleverly concealed in a secret compartment in the bottom part of the luggage bag. From the evidence of SP4, the secret compartment in the luggage bag was held on by screws. The screws have to be opened before a hard cover is found. The hard cover had to be pulled away before a black plastic bag is discovered which contained the drugs. This secret compartment was custom made for the purpose of hiding the impugned drugs. Similarly, as in *Herlina Purnama Sari*, 'the manner in which the impugned drugs were concealed in the luggage bag showed that the respondent knew of the existence of the drugs there, the impugned drugs to avoid and escape detection'. Therefore, the evidence showed that the accused had custody and control of the bag which consists of the drugs and she also has knowledge.

[31] The defence in the present appeal referred to us the case of *Public Prosecutor v Abdul Manaf bin Muhamad Hassan* [2006] 3 MLJ 193; [2006] 2 CLJ 129 to support the proposition that the mere act of transporting or carrying the drugs was not sufficient to prove the offence of trafficking of

dangerous drugs by the accused persons.

Similarly, in the case of *PP v Herlina Purnama Sari* the Court of Appeal applied the decision of *PP v Abdul Manaf Muhamad Hassan* and held that the accused therein merely had passive possession. The Court of Appeal in *Herlina Purnama Sari* held that 'The prosecution had to adduce evidence that would show that the respondent had more than just passive possession in order for the act to constitute the offence of trafficking under s 39B(1)(a) of Act 234'.

[32] The Federal Court in *PP v Herlina Purnama Sari* however held that the Court of Appeal had wrongly applied the decision of *PP v Abdul Manaf Muhamad Hassan* to *Herlina Purnama Sari*. Although the Federal Court in *PP v Abdul Manaf bin Muhamad Hassan* said that 'the mere act of carrying is not sufficient to constitute the offence of 'trafficking', however that statement must not be taken in isolation'. The Federal Court in *Herlina Purnama Sari* said that:

> It must be read in the context of what was said by Lord Diplock in *Ong Ah Chuan v PP and another appeal* with regard to the interpretation of the word 'trafficking'. This court in *PP v Abdul Manaf Muhammad Hassan*, after quoting what was observed by Lord Diplock on the interpretation of the word 'trafficking' concluded as follows:
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> (2) In the present case, it was the finding of the trial court and the Court of Appeal that the drug in question was in the custody and control of the respondent at the material time and invoking the presumption under s 37(d) of the Act, the respondent was deemed to be in possession of such drug. The respondent failed to rebut the said presumption. It was not in dispute that when he was arrested, the respondent was in fact carrying the said drugs. Judging from the manner the drug was being carried ie in small plastic packets and taking into account the total amount of the drug involved, the reasonable inference that may have been drawn was that the respondent was in fact carrying it for the purpose of trafficking. Furthermore the large quantity of the drug involved, it could not be seriously contended that it was for his own consumption. In any event it was never suggested in his defence that it was so, his defence being a mere denial that the drug was ever found on him, a contention that the trial judge had rejected. On the facts of this case, the respondent was not a passive carrier and had the trial judge properly directed himself, he would have nonetheless come to the same finding ...

[33] Thus, from the above case, the proposition that there must be in all cases an overt act in order to constitute trafficking is misplaced. From the facts in our present appeal, the manner the drugs were carried, ie concealed in a secret compartment and the large quantities involved ie 1,490.7g, it could not be said that it was for personal consumption. Neither had it been suggested to be so by the accused, in fact the defence totally denied knowledge of the presence of the drugs in the luggage bag, P24. These facts negatived the defence case that the accused was a passive carrier.

Defence of innocent carrier

[34] The accused in her evidence mentioned the existence of Fang who was allegedly responsible for putting the drugs in the luggage bag, P24 and asking her to go to Malaysia to deliver threads to a friend in Malaysia. Except for the bare assertion of the accused, there was no other evidence to support this piece of evidence.

[35] It was in evidence that, before the accused travelled to India upon the invitation of Fang, the accused has never travelled abroad. For the accused who is a housewife living in Vietnam was willing to travel to India alone (without the husband), and transit in Malaysia to meet with a man, Fang to visit places of interest in India, is unbelievable. Fang was never called to testify to corroborate her evidence and neither was her husband.

[36] Further, the accused only knew Fang about a month before she decided to travel alone to India to meet up with him. During that short space of time, the accused put her entire trust on this 'Fang', enough for her to travel the globe alone to visit interesting places in India, courtesy of 'Fang' as the tourist guide. She was in India for five days. Apart from knowing his name as 'Fang', there was nothing else that the accused knew of Fang. Despite the alleged friendship as asserted by the accused, in cross-examination the accused agreed that she did not know him very well. The accused do not even know what Fang worked as or what was he doing in Vietnam although the accused claimed that Fang and her, had numerous conversations in Vietnam before she took the trip.

[37] One disturbing fact about the story of the accused in relation to the luggage bag, P24, is this: the accused said that Fang told her to deliver the threads which was packed in the luggage bag, P24 to a friend of his in Kuala Lumpur. That was all. This is evident from the cross-examination of the accused:

Q: So, his instruction was only to pass the thread? No other instruction?

A: Yes.

Q: So the bag you will take with you to Vietnam and keep it at your home?

A: Yes.

[38] There was no instruction to deliver the luggage bag, P24, to the friend in Kuala Lumpur. The dangerous drugs were found in a secret compartment at the bottom of the luggage bag, P24. If the instruction by Fang was just to deliver the threads to the friend, then the luggage bag, P24, with the dangerous drugs in the secret compartment in the luggage bag would still be with the

accused. If Fang was the one who planted the dangerous drugs in the luggage bag, P24, without the accused knowing (as it is hidden in the secret compartment), why would he just give the luggage bag, P24, with the drugs without any instruction as to what to do with the bag. Then what is to happen to the bag, P24, containing the drugs. Surely it has a destination. It is against logic for Fang to give the luggage bag, P24, containing the dangerous drugs which is 1,490.7g of methamphetamines to the accused with no instruction as what to do with the bag, P24, but only the threads, which is of no significance any way. Much importance seemed to be placed on the delivery of the threads to the friend in Malaysia. From the evidence, there was nothing special about the threads that befitted it to be taken all the way from India and to be delivered to someone in Malaysia, on a transit stop. The threads were to be picked up in Malaysia by the friend when she arrived at a hotel which was near the airport. This particular friend also appeared to have no name, details nor phone number, as Fang did not provide any details to the accused. The accused does not seem to bother about the lack of such details.

[39] From the receipt itinerary P18B and P19B of the flight of the accused, it is not a transit flight provided by the airlines where the accused had to make a stop in Malaysia before her onward flight to Vietnam. It was the accused who chose to make a stop in Malaysia after Calcutta, India before Vietnam. She even slept over in Malaysia before flying off to Vietnam on 2 December 2012. Why the necessity to sleep over in Malaysia when the evidence said that she was only to be in transit in Malaysia.

[40] It was the finding of the learned High Court judge that he did not believe the existence of Fang let alone believe that the bag containing the drugs was given by Fang (refer to p 15 at para 15 of RA *Jld* 1).

[41] We have no reason to disturb these findings by the learned trial judge after evaluating the facts that is before us. Firstly, it is unbelievable that the accused could travelled alone abroad when she had never done so in her life before, to meet with Fang who she hardly knew. The accused could not give any details of Fang, namely his full name, his occupation. Secondly, the accused said that the instruction from Fang is to deliver the thread which is in the luggage bag, to his friend in Malaysia. Again the accused has no details of this friend. She was only told to go to a hotel which was near the airport. The 'friend' of Fang will come to pick up the threads from the accused at the hotel. However, there was no instruction from Fang as to how the impugned drugs were to be delivered. If that is the situation, in all likelihood the drugs did not belong to Fang. If it was, surely Fang would have instructions as to what to do with the luggage bag, P24, which contained the drugs. Hence, we do not find that the learned trial judge was wrong when he made the finding that 'there was

nothing in the evidence of the accused to raise any doubt that the drugs did not belong to the accused or that she had brought the drugs into Malaysia for the purpose of trafficking'.

[42] The manner in which the impugned drugs were concealed in the bottom of P24 was to avoid from being detected, proved that the accused knew the contents of the luggage bag. In addition the luggage bag, P24, was kept under lock and key by the accused and the padlock and key was all the while at the material time was under her possession. The accused has ample time to check the contents of the luggage bag, P24 if she chose to. The facts would have caused suspicion on the part of the accused if indeed the luggage bag, P24 was given to the accused by Fang. The accused would have realised or seen the secret compartment screwed at the bottom of the luggage bag, P24. However, she willfully shuts her eye.

[43] The accused could not assert the absence of knowledge on her part as to the contents of the luggage bag, P24. Her evidence gave her away. There was no instruction from Fang as to what to do with the luggage bag, P24, that contained the impugned drugs. This means that Fang has got nothing to do with the drugs in the bag. If not for the fact that the accused was detained by the customs officers at the airport, the accused would have been able to deal with the luggage bag, P24, with the drugs in it, ie to be delivered to a third party in Malaysia. That would be the logical reason for the stopover in Malaysia.

[44] In assessing the totality of the appeal, we found no basis to disturb the findings of the learned trial judge that 'the evidence by the accused was insufficient for the court to even believe in the existence of the person called Fang let alone that the bag containing the drugs was given by Fang'. He did not err when he made such findings.

[45] The accused's story is highly improbable, and she could not exculpate herself by denying knowledge or that she was an innocent carrier. For the reasons abovementioned, clearly her act falls within the definition of s 2 of the DDA, which includes the act of carrying, concealing, transporting, exporting and keeping. Hence, the charge of trafficking had been proved beyond reasonable doubt against the accused.

[46] We found no appealable error on the part of the learned trial judge. We unanimously dismissed the appeal and affirmed the conviction and sentence of the learned High Court judge ie the mandatory death penalty.

Appeal dismissed; conviction and sentence of learned High Court judge affirmed.

Reported by Dzulqarnain Ab Fatar